IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 140 OF 2021

IN THE MATTER OF SECTION 51(1)(c) OF THE IMMIGRATION (TRANSITION) ACT, 2018

IN THE MATTER OF ORDER 55 OF THE GRAND COURT RULES

AND IN THE MATTER OF THE REVOCATION OF THE RESIDENCY AND EMPLOYMENT RIGHTS CERTIFICATE HELD BY ALAN LAWREMS TAYLOR DOMINGUEZ GRANTED PURSUANT TO SECTION 31 IMMIGRATION ACT, 2013.

ALAN LAWREMS TAYLOR DOMINGUEZ

Appellant

-v-

IMMIGRATION APPEALS TRIBUNAL

Respondent

OPEN COURT

Appearances:	Mr. Alastair David of HSM Chambers for the Appellant Ms Heather Walker, Attorney General's Chambers for the Respondent
Before:	Hon Mr Justice Alistair Walters (Actg.)
Heard:	1 April 2022
Draft Circulated:	13 April 2022
Judgment Delivered:	29 April 2022

HEADNOTE

Appeal against revocation of permanent residency and residency and employment rights certificate, extent to which rights to private and family life pursuant to section 9 of the Bill of Rights are relevant to decisions of the Caymanian Status and Permanent Residency Board and Immigration Appeals Tribunal, failure of Caymanian Status and Permanent Residency Board and Immigration Appeals Tribunal to have adequate policies and procedures to ensure that section 9 rights are protected and failure of the Immigration Appeals Tribunal to apply up to date law and proper analysis to its decision to ensure that those rights are protected. Remission of appeal to Immigration Appeals Tribunal. Interpretation of Immigration (Transition) Act 2022.

JUDGMENT

Summary of background

1. This is the substantive hearing of the Appellant's appeal against the Respondent's decision (the "**Decision**") confirmed in a letter dated 7 June 2021 (the "**Decision Letter**") to refuse to reinstate the Appellant's Residency and Employment Rights Certificate ("**RERC**") following the revocation of that Certificate by the Caymanian Status and Permanent Residency Board (the "**Board**") on 24 October 2019.

2. The Appellant seeks a declaration that the Decision was wrong in law or, in the alternative, that it was unreasonable, irrational or procedurally unfair, and for the matter to be remitted to the Respondent (also the "IAT") for reconsideration.

3. Pursuant to GCR O.55, r.1, the Appellant's Notice of Originating Motion was filed on 2 July 2021 and served on the Respondent on 6 July 2021. In accordance with case management directions agreed between the parties by consent and approved by the Court on 11 August 2021, on 31 August 2021 the Respondent filed a Response to the Originating Motion.

Background

4. I have set out below the background. In doing so, I have made use of the helpful summary provided by Ms Walker in her skeleton argument.

5. The Appellant has been married to Ms. Neydis Taveras since 15 November 2013. Ms. Taveras is a Cuban national who was granted Caymanian Status on 18 June 2002. Following their marriage the Appellant applied for an RERC as the spouse of a Caymanian, which was approved on 23 January 2014. The Appellant is originally from Colombia.

6. The Appellant and Ms. Taveras' son, M (abbreviated for privacy reasons), was born in 2016. M is Caymanian.

7. On 29 March 2019 Dame Linda Dobbs, Acting Judge of the Grand Court, ordered that the Appellant was to serve two sentences of four years' imprisonment in relation to one offence of conspiracy to

import a controlled drug and another offence of importing cocaine. The two sentences were to run concurrently with time spent in custody on remand to count towards the sentences.

8. By letter dated 24 July 2019, the Board wrote to the Appellant to advise him that it was minded to revoke his RERC. The Appellant was given an opportunity to provide his views and he duly did so by letter dated 26 August 2019 together with various enclosures including a letter from Ms. Taveras, his son's birth certificate, visitor records from Her Majesty's Cayman Islands Prison Service ("HMCIPS") and a supportive letter from his former employer.

9. The Appellant was released from HMP Northward on a Conditional Release Licence on 17 October 2019.

10. On 24 October 2019, the Board revoked the Appellant's RERC. This was communicated to him by letter of 28 October 2019. The relevant parts of that letter stated:

> *"I refer to your [RERC] previously granted to you and write to advise you that the [Board] has revoked your [RERC] with effect from 24 October 2019. Further details of the Board's decision are indicated below (if any):*
>
> - *Revoked pursuant to Section 38 (1) (c) of the Immigration Law (2015 Revision)."*

11. By letter of 14 November 2019, the Appellant served a Notice of Appeal on the Respondent in relation to the Board's decision. On 20 July 2020, the Appellant was provided with the Board's Appeal Statement and on 17 August 2020 the Appellant submitted detailed grounds of appeal.

12. The Respondent met on 26 November 2020. The minutes of that meeting record the conclusion of the Respondent that grounds of appeal had been established on the basis that the Board had failed to consider the Appellant's rights, and the rights of Ms. Taveras and M, under section 9 of the Bill of Rights ("BOR") and on the basis that the Board had failed to provide full reasons for how it had arrived at its decision.

13. The Respondent deferred the matter in order for the Appellant to provide an update on his relationship with Ms. Taveras and M and an update from HMCIPS. The Respondent sought an updated letter from Ms. Taveras as to the current state of their marriage and the Appellant's relationship with M, information as to whether Ms. Taveras and M continued to visit the Appellant in prison, information as to the difficulties that Ms. Taveras and M would likely encounter if the

Appellant was returned to his country of origin, and an updated letter from HMCIPS on "*the Appellant's behaviour, visit list and visit record and categorisation etc.*" The Respondent indicated that, upon receipt of this information, the appeal was to be listed for a hearing date.

14. By letter dated 21 December 2020, the Respondent wrote to the Appellant's legal representative to inform the Appellant of the Respondent's decision to defer the appeal and to request the further information referred to in the minutes of its meeting of 26 November 2020.

15. The Respondent was subsequently provided with a sworn affidavit of Ms. Taveras, dated 18 January 2021, together with four exhibits which included a letter dated 14 January 2021 from the Department of Community Rehabilitation, several character references, and the 2019 US State Department's Human Rights Report on Colombia.

16. The Respondent met for a second time on 1 April 2021. The minutes of that meeting record the Respondent's Decision not to reinstate the Appellant's RERC, with reasons, and that the Respondent dismissed the appeal (the "1 April 2021 Minutes"). The Decision was conveyed to the Appellant by way of the Decision Letter but it is understood not to have been received by the Appellant until 8 June 2021. The Appellant now appeals that Decision.

17. A extract from the minutes of a meeting the IAT held on 26 November 2020 (the "26 November 2020 Minutes") reads as follows:

> *"The Tribunal carefully considered the Notice of Appeal received by the Secretariat on 14th November 2019 against the decision of the [Board] to revoke the [RERC] for the spouse of a Caymanian spouse pursuant to section 38 (1) (c) of the Immigration law (2015 Revision).*
>
> *The Tribunal reviewed the Appeal Statement received by the Secretariat on 20th July 2020, noting the following:*
>
> - *On 29th March 2019, the Appellant was sentenced with 4 years' imprisonment for* "Being concerned with the importation of cocaine".
> - *In noting the Appellant's conviction, the Board advised the Appellant by way of letter dated 24th July 2019, that it was minded to revoke his RERC and asked that he provide written reasons as to why his RERC should not be revoked. The Appellant was given 15 days to provide this information.*
> - *In response, the Appellant provided a letter from himself dated 26th August 2019, a letter from his spouse dated 21st August 2019, his marriage certificate, his son's birth certificate, a copy of his visit list and visit*

record, a letter conforming his security category and a letter from his previous employer.

- *Both him and his spouse asked that the Board be lenient in considering the matter and also consider keeping his family together. It was also stated that the Appellant was a good father and continued to support his family even whilst being imprisoned. It was further asked that the Board consider that the Appellant had been a good citizen prior to this incident. The letter from the Chair of the Categorization Board said that his Security Category had been downgraded to C after considering:*
  - *Drug Test Report – Negative for Ganja and Cocaine*
  - *Security Report - No concerns*
  - *Wing Report - excellent*
  - *Consistent employment and education involvement*
  - *Case Management engagement*
  - *No infractions in the last six (6) months*

- *The letter dated 5th August 2019, from the Appellant's previous employer stated that he was very hard working and responsible during his time of employment and that he (the previous employer) was made to understand that the Appellant would soon qualify to engage in employment within the community and thus he was offering the Appellant employment as soon as he was able to accept it.*

- *On 24th October 2019, the matter was back before the Board and the Board revoked the Appellant's RERC.*

The Tribunal considered the Detailed Grounds of Appeal received by the Secretariat on 17th August 2020.

The Tribunal determined that grounds of appeal have been established as the CS/PR Board was unreasonable by not giving consideration to the Appellant, his Caymanian spouse and child's rights under Section 9 of the Bill of Rights nor did the Board [provide] full reasons for how they arrived at their decision.

It was agreed that the Tribunal shall consider the following points from The European Court of Human Rights case of Amrollahi v Denmark *with regards to the Appellant's circumstances:*

1. *Nature and seriousness of offence;*
2. *Length of applicant's stay in the country;*
3. *The time elapsed since the offence was committee and the applicant's conduct during that period;*
4. *The nationalities of the various persons concerned;*
5. *The applicant's family situation, such as length of marriage;*
6. *Whether the spouse knew of the offence at the time when he or she entered into a family relationship;*
7. *Whether there are children of the marriage and, if so, their age; and*

8. *The difficulties which the spouse is likely to encounter in the country of origin.*

In connection with the above relevant points, the Tribunal members specifically noted the following:

1. *It was conceded by the Appellant that the offence was very serious. The Appellant has been convicted for "*being concerned with the importation of cocaine*" and sentenced to 4 years custodial sentence. The Appellant's letter stated "...*I committed one of the worse criminal crimes against another human being. I was not a decent person at that time". *The Tribunal acknowledges that the importation of cocaine into the islands is a serious offence and should not be taken lightly.*
2. *Appellant has been living in the Cayman Islands for 12 years.*
3. *It was noted that, the Appellant had not been convicted of any crimes for nine years prior to his incarceration and it was verified by Her Majesty Prison Service that the Appellant is a model prisoner.*
4. *The Appellant is married to a Caymanian who is the mother of three Caymanian children, one of whom is for the Applicant.*
5. *The Appellant has been married since 2013.*
6. *The offence occurred during the marriage to the Appellant's Caymanian spouse. The spouse was arrested but not charged for an offence in relation to the Appellant's crime.*
7. *There is one Caymanian child and two Caymanian step-children of the marriage. The Tribunal notes that the ages of the children are as follows: 17, 13 and 4.*
8. *The appellant is from Colombia. The Tribunal are unsure what difficulties the Caymanian spouse and children would face if the Appellant had to return to Colombia.*

The Tribunal determined to defer this matter for the Appellant to provide an update on his relationship with his Caymanian spouse and child and an update from HMCIPS.

Conclusion

The Tribunal determined to defer this appeal for an update from the Appellant within twenty-eight days:

- *An updated letter from the Appellant's Caymanian spouse on:*
  - *The current status of their marriage and the Appellant's relationship with his Caymanian child;*
  - *Does the Caymanian spouse and child continue to visit the Appellant in prison;*
  - *What difficulties would the Appellant's Caymanian spouse and child likely encounter if the Appellant was returned to his country of origin; and*
- *An updated letter from [HMCIPS] on the appellant's behaviour, visit list and visit record, categorization etc..."*

18. The Decision Letter repeats much of what was said in the 26 November 2020 Minutes quoted above including the reference to *Amrollahi v Denmark*. The additional, relevant section of the Decision Letter read as follows:

> *"In connection with the above relevant points, the Tribunal members specifically noted the following:*
>
> ....
>
> *8. The Appellant is from Colombia. In an affidavit by the Appellant's spouse sworn on 18 January 2021 she stated at paragraph 15 and 16.*
>
> *'I note that the Tribunal are requesting what difficult my family and I would face if we were to go to Colombia with Alan. The simple fact is that my family unit could not go to Colombia. There are numerous reasons for this, most obviously:*
>
> *i. Our safety*
> *ii. Disrupting my children's education*
> *iii. I would be required to obtain new employment which would be difficult due to the nature of the job that I do*
> *iv. I have been living in the Cayman Islands since I was 9 and consider this my home and have no intentions of living elsewhere.'*
>
> *The Tribunal determined that the decision to revoke the Appellant's RERC is discretionary however the tribunal must consider Section of the Cayman Islands Constitution Order.*
>
> *After the Tribunal reviewed the matters mentioned above, the nature and seriousness of the offence weighs heavily in comparison to the other factors. The Tribunal noted the seriousness of the effects of cocaine use on addicts and the poverty and crime that results. The high number of known cocaine addicts seen begging on our streets along with the breakdown of family life was also considered. Additionally, the Tribunal took account of the adverse effects failing to reinstate the Appellant's RERC would have on his Caymanian family, however the seriousness of the offence overrode the Appellant's right to live here with his family in the Tribunal's opinion.*
>
> *As a non-Caymanian the Appellant abused the privileges afforded to him as the spouse of a Caymanian and is not now entitled to have those rights re-instated as a result of the hardships to be suffered by his family. It was also noted that the Appellant could arrange to visit his family in a safe country as his home country is deemed too unsafe to visit.*

The Tribunal determined not to re-instate the Appellant's RERC for Spouse of a Caymanian.

The Tribunal determined that the nature and seriousness of the offence weighed heavily and as such have agreed to not re-instate the Appellant's RERC for Spouse of a Caymanian.

Accordingly, the appeal is unanimously dismissed."

Relevant law relating to the Board and IAT

19. At the time of the Decision the relevant provisions dealing with the forfeiture of a spousal RERC were found in the Immigration (Transition) Act (2021 Revision) ("**the 2021 Act**")[1]. However, on appeal, the IAT has to apply the law that was in effect at the time of the decision of the Board or Director of the Department of the Government know as Workforce, Opportunities and Residence Cayman Office ("WORC")[2]. The law in effect at the time of the Board's decision in issue before the Respondent was the Immigration (Transition) Act, 2018 ("**the 2018 Act**"), which came into force on 1 February 2019.

20. Section 40(1) of the 2018 Act provides as follows:

> *"(1) Subject to subsection (2), the holder of a Residency and Employment Rights Certificate who is the spouse of a Caymanian or has obtained a Residency and Employment Rights Certificate as a result of his or her marriage to the holder of a Residency and Employment Rights Certificate under section 37(16) or any other earlier analogous provision, shall forfeit his or her rights under that Certificate if —*
>
> *(a) the holder falls within any of the provisions of section 51;*
> *(b) the holder's spouse ceases to be a Caymanian or to be a Residency and Employment Rights Certificate holder;*
> *(c) within ten years of the marriage, the marriage is dissolved or annulled;*
> *(d) the holder ceases to be legally and ordinarily resident in the Islands; or*
> *(e) the holder and his or her spouse are living apart —*
> *(i) under a decree of a competent court;*
> *(ii) under a deed of separation; or*
> *(iii) in circumstances where, in the opinion of the Board or the Director of WORC, the marriage has irretrievably broken down."*

[1] There is now a 2022 Revision which is not materially different for these purposes. For these purposes reference is made to the 2021 Act.
[2] Section 21(4) of the 2021 Act.

21. The relevant provisions of section 51 of the 2018 Act provide as follows:

> *"51. (1) The Board or the Director of WORC may, in respect of any person who has been granted permission to reside permanently in the Islands, revoke such permission where-*
>
> ...
>
> *(c) the person has been convicted of an offence against the laws of the Islands;..."*

22. The Board has a discretion under section 51(1) and it is the exercise of that discretion that was reviewed by the IAT.

23. On an appeal to the IAT, section 21(1) of the 2021 Act provides as follows:

> *(1) Save as otherwise provided in this Act, any person aggrieved by, or dissatisfied with, any decision of the Director of WORC or the Director's designate under section 37, 49 or 56(5) or of a Board other than a decision under section 20 may, within —*
>
> *(a) twenty-eight days of the communication of the decision to the person; or*
>
> *(b) such longer period as the chairperson of the Appeals Tribunal may, for good reason shown, allow,*
>
> *serve notice on the Immigration Appeals Tribunal of the person's intention to appeal such decision.*

24. As set out in section 21(8) of the 2021 Act, an appeal under section 21 may be lodged on the ground, or grounds, and no other, that the decision in question is erroneous in law; unreasonable; contrary to the principles of natural justice; or at variance with regulations made under section 72 of the 2021 Act[3].

25. Upon receipt of detailed grounds and any subsequent information requested, the IAT may:

a. if it is satisfied that the appellant has complied with the procedural requirements of section 21, proceed with a hearing on the grounds; or,

b. if it is satisfied that the appellant has failed to comply with any of the requirements of section 21, quash the appeal without a hearing on the grounds[4].

26. Section 22(1) of the 2021 Act provides that a hearing on the grounds is to take into account:

---

[3] Section 21(8) of the 2021 Act
[4] Section 21(9) of the 2021 Act

a. the reasons provided by the Board and all the information that was submitted by the appellant at the time of the appellant's original application; and,
b. the written detailed grounds filed by the appellant.

27. Where, at a hearing, the IAT determines that at least one of the grounds contained in section 21(8) has been made out, the IAT is to proceed to a rehearing of the *"original application"* which was the subject of the appeal[5]. I will come back to the words "*original application*" below.

28. In this case, the appeal crossed the procedural threshold set by section 21(9) and the IAT accepted that the Board had erred in law so proceeded to a re-hearing.

29. Pursuant to section 21(4) of the 2021 Act, whilst the IAT is to apply the law that is, or was, in force at the time of the decision of the Board or Director of WORC, it is the law in force at the time of the rehearing by the IAT that governs the proceedings under section 22(5)[6].

30. The rehearing of the "*original application*" is to be based on written submissions with respect to fresh evidence or changes in circumstances[7].

31. Finally, pursuant to section 22(10) of the 2021 Act:

> *"An appeal to the Immigration Appeals Tribunal and matters referred to the Immigration Appeals Tribunal may not be remitted to the pertinent Board or to the Director of WORC."*

32. An appeal may be made to the Grand Court from a decision of the Respondent on a point of law only[8].

33. Pursuant to GCR O. 55, r. 7(5) the Grand Court may give any judgment or decision, or make any order, which ought to have been given or made by the tribunal and make such further or other orders as the case may require or may remit the matter with the opinion of the Court for rehearing and determination by the tribunal.

---

[5] Section 22(4) of the 2021 Act
[6] Section 22(6) of the 2021 Act
[7] Section 22(7) of the 2021 Act
[8] Section 23(2) of the 2021 Act

Submissions of the parties

34. The parties produced detailed submissions for the hearing which reflected closely the Originating Motion and the Amended Response so I will deal with the pleadings and submissions together.

Summary of the position of the Appellant

Error of law

35. The Appellant's first point is that as a statutory body, the Respondent can only act within their powers as defined by statute. Upon concluding that a ground of appeal is made out, section 22(4) of the 2021 Act sets out that the Respondent shall proceed to a rehearing of the original application. The Board had decided to revoke the Appellant's RERC on their own volition not because of an application that the Appellant had made. On the Appellant's case, that can only be the original application that the Appellant made for his RERC in 2013. The Appellant says that there was no original application for the Board to have heard in 2019. There was no requirement in law for the Board to exercise their discretion to review the matter and there are no policies which state that they have to review matters or in what circumstances they have to review matters.

36. It is therefore contended by the Appellant that, in circumstances where there is no original application to be heard, i.e where the Board are acting on their own volition, the Respondent should have merely quashed the decision, as it was wrong in law and proceeded no further.

37. In support of the Appellant's position he argues the following:

37.1 Contrary to the position of individuals who have had an application rejected (i.e. a Permanent Residence application or Work Permit application), a person who has resided in the Cayman Islands for more than 9 years and had their Caymanian Status revoked pursuant to sections 33 or 34 of the 2021 Act or their RERC revoked pursuant to sections 40 or 51 of the 2021 Act cannot obtain a work permit unless in the most extreme circumstances. Therefore, the Respondent should have dealt with matters quickly and returned the permission which had been incorrectly revoked to the individual as soon as possible. By carrying out a *de novo* hearing the Respondent was delaying matters.

37.2 There is nothing preventing the Board from making a subsequent "fresh" decision, when they have earlier erred in law. In the circumstances, it is argued that the decision should have been quashed, the Appellant's RERC returned to him and the Board then should have freshly considered the matter and given the Appellant the opportunity to be heard.

37.3 By the Respondent acting in the way that they had, they have effectively reduced the Appellant's right to make submissions before the Board.

37.4 However, in the event that the original application which needed to be considered *de novo* was the application for his RERC which the Appellant submitted in December 2013, it would have been incumbent upon the Respondent to consider section 38(9) of the 2018 Act. As the Respondent failed to consider section 38(9) of the 2018 Act it is averred by the Appellant that the Respondent has erred in law. Section 38(9) of the 2018 Act states:

> *"(9) Where a person who is the spouse of a Caymanian and who has at any time been —*
>
> *(a) the holder of a work permit;*
> *(b) employed by the Government of the Islands; or*
> *(c) employed in the Islands by the Government of the United Kingdom,*
>
> *applies for a Residency and Employment Rights Certificate under this section, then, in the absence of exceptional circumstances, the Board or the Director of WORC shall approve his or her application."*

37.5 It is argued that the fact that the Appellant has a criminal conviction does not in itself amount to "*exceptional circumstances*". It is therefore argued that when one has regard to:

37.5.1 the Appellant's family life in the Cayman Islands;

37.5.2 the fact that the Grand Court chose not to recommend to Cabinet that he should be deported;

37.5.3 the Appellant's rehabilitation and the fact that he gave evidence against his codefendants; and

37.5.4 his private life in the Cayman Islands,

the Appellant's conviction does not cross the exceptional threshold and therefore he should have had his RERC returned to him and failure to do so amounts to an error of law.

Failure to consider all the relevant factors

38. Counsel for the Appellant highlighted that while it is accepted that the European Convention on Human Rights is not directly incorporated into Cayman Islands law, in the case of *R v Whorms*[9] the Honourable Chief Justice, held;

> *"The principle is that while the courts may not purport to give effect to unincorporated treaty obligations, if to do so would involve an affront to domestic legislation to the contrary, the treaty obligations may nonetheless serve as a guide to the interpretation of domestic legislation in the event of doubt as to its meaning. The treaty obligations though not yet incorporated into domestic legislation, serve as a guide to construction, because by its accession to those obligations, the State promises duly to observe them. Thus, in the absence of a provision in domestic legislation, which clearly expresses an intention not to do so, domestic legislation will be construed as intended to observe the treaty obligations. The case law in this jurisdiction can now, encouragingly, be regarded as settled on these principles. See, for instance, Grant v. John A. Cumber Primary School (Principal) (4) and Ebanks (A.G.) v. R. (3)."*

39. The reference by the IAT in the Decision Letter to the case of *Amrollahi v Denmark*[10] is therefore consistent with this approach to European human rights law. However, it is further argued that the Respondent erred in law by limiting their consideration to the factors set out in that case. In *Amrollahi*, the Grand Chamber of the European Court of Human Rights ("ECHR") followed the criteria set out in the earlier case of *Boultif v Switzerland*.[11] Both cases considered the approach that a court should take when considering the expulsion of an individual from a country and in particular how to balance the competing interests of the community/society in that country in upholding and enforcing its law and an individual's constitutional rights to family life[12]. The criteria in question are the same eight criteria that were referred to by the IAT in the extract from the 26 November 2020 Minutes and the Decision Letter of 7 June 2021.

40. The basis of the Appellant's position in relation to this part of his case is that whilst in *Amrollahi* reference is made to the children of that appellant, it did not specifically address the "*best interests and well-being of the children*". A later judgment of the Grand Chamber in the case of *Üner v Netherlands*[13] stated:

---

[9] [2008 CILR 188] at paragraph 13.
[10] [2002] ECHR 580
[11] [2001] 33 EHRR 50, at paragraph 48 of the Judgment.
[12] Article 8 of the European Convention on Human Rights (the "Convention")
[13] [2007] 45 EHRR 14

"58. *The Court would wish to make explicit two criteria which may already be implicit in those identified in the Boultif judgment:*

- *the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and*

- *the solidity of social, cultural and family ties with the host country and with the country of destination."*

41. Counsel for the Appellant argues that the effect of the *Üner* case is to add these two additional criteria to the eight already identified in *Amrollahi*. The importance of the additional criteria was emphasized by the English Supreme Court in *Ali v Secretary of State for the Home Department*[14]:

"*26. In a well-known series of judgments the court has set out the guiding principles which it applies when assessing the likelihood that the deportation of a settled migrant would interfere with family life and, if so, its proportionality to the legitimate aim pursued. In Boultif v Switzerland (2001) 33 EHRR 50, para 48, the court said that it would consider the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he or she is to be expelled; the time elapsed since the offence was committed and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; whether there are children of the marriage, and if so, their age; and the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled. Two further factors were mentioned in Üner v Netherlands (2007) 45 EHRR 14, para 58: the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of the social, cultural and family ties with the host country and with the country of destination. In Maslov v Austria [2009] INLR 47, paras 72-75, the court added that the age of the person concerned can play a role when applying some of these criteria. For instance, when assessing the nature and seriousness of the offences, it has to be taken into account whether the person committed them as a juvenile or as an adult. Equally, when assessing the length of the person's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it makes a difference whether the person came to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. Some of the factors listed in these cases relate to the strength of the public interest in deportation: that is to say, the extent to which the deportation of the person concerned will promote the legitimate aim pursued. Others relate to the strength of the countervailing interests in private and family life. They are not exhaustive.*

[14] [2016] 1 W.L.R. 4799, at paragraphs 26 and 93

....

93. *Although the court identified these two particular criteria as being of especial importance, the matter of significance (so far as the present appeal is concerned) is the court's proclamation that the Boultif criteria are fundamental in the examination of whether article 8 has been breached. Different emphasis might be placed on some of those criteria in different cases. Particular importance (as in Mr Üner's case) may be accorded to some of them, reflecting the specific circumstances of an individual. But, the relevance of the factors in article 8 cases involving expulsion is not left in doubt. Their status as guiding principles, to be considered and, where appropriate, applied in all such cases, is clearly affirmed."*

42. The Appellant says that it is clear from the 1 April 2021 Minutes that only a cursory examination was made in regards to M and that neither the 1 April 2021 Minutes nor the Decision Letter considered the best interests of the children in a way that is consistent with *Üner*. The Appellant says that this is particularly important because Article 3 of the UN Convention on the Rights of the Child, to which the Cayman Islands is a signatory, states:

> *"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

43. Counsel for the Appellant cited the case of *EB (Kosovo) v Secretary of State for the Home Department*[15] which made reference to the case of *Huang v Secretary of State for the Home Department*[16]:

> *"In Huang ..., para 18, it was recognised that decisions under article 8 may, depending on the facts of the given case, involve the weighing of multifarious considerations*:
>
> "It is unnecessary for present purposes to attempt to summarise the Convention jurisprudence on article 8, save to record that the article imposes on member states not only a negative duty to refrain from unjustified interference with a person's right to respect for his or her family but also a positive duty to show respect for it. The reported cases are of value in showing where, in many different factual situations, the Strasbourg court, as the ultimate guardian of Convention rights, has drawn the line, thus guiding national authorities in making their own decisions. But the main importance of the case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters

[15] [2008] UKHL 41, at paragraphs 11&12
[16] [2007] UKHL 11.

such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant. The Strasbourg court has repeatedly recognised the general right of states to control the entry and residence of non-nationals, and repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live. In most cases where the applicants complain of a violation of their article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of article 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved. Proportionality is a subject of such importance as to require separate treatment."

With reference to proportionality it was said, at para 20:

"In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality."

12. *Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires."*

44. While the Appellant says that it is not the case that every single factual finding has to be stated, he argues that the primary factual findings have to be referenced. The Appellant argues that this has been made clear now in a number of cases involving the Respondent most notably in the cases of HS

& Ors[17] and *Ellington v Chief Immigration Officer*[18] where both Mangatal J and Williams J quote with approval from the case of *National Road Authority v Bodden*[19] in particular:

> *"25. The constitutional guarantee and the right of appeal on a question of law mean that a decision of the RAC must meet certain minimal standards. It is not enough simply to state a result on the principle issues; the parties are entitled to know the reasoning and the primary findings of fact which led the RAC to its conclusion. The obligation has been described in this fashion by the House of Lords in South Bucks. D.C. v. Porter (No. 2) . . . ([2004] 1 W.L.R. 1953, at para. 35):*
>
> > *'The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn.'"*[20]

45. The Appellant referred to *Ali v Secretary of State for the Home Department* [2016] 1 W.L.R 4799 which comments on how to structure a judgment and the importance of (in that case the First-tier Immigration Tribunal in England) setting out:

> *"in clear and succinct terms their reasoning for the conclusion arrived at through balancing the necessary considerations ....*
>
> *One way of structuring such a judgment would be to follow what has become known as the "balance sheet" approach. After the judge has found the facts, the judge would set out each of the "pros" and "cons" in what has been described as a "balance sheet" and then set out reasoned conclusions as to whether the countervailing factors outweighed the importance attached to the public interest in the deportation of foreign offenders."*[21]

46. In the current matter, the Appellant says that the Respondent clearly failed to identify where the best interests of the children lay and therefore failed to apply that factor when assessing matters in a proportionate way. It is argued that the Respondent should have considered the best interests of the

---

[17] [2019] 1 CILR 545, at paragraph 29 of the Judgment
[18] Unreported Grand Court 209 of 2016 and 216 of 2018, 29 April 2020, at paragraph 87 of the judgement.
[19] [2014] 2 CILR 47
[20] [2014] 2 CILR 47, at paragraph 25
[21] At paragraphs 82 & 83 per Lord Thomas of Cymgiedd CJ. See also *HA (Iraq) & RA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176 at paragraph 28.

child and, by the very fact that no reference is made to the best interests of the children, the Respondent has either erred in law or acted unreasonably.

Failure to place sufficient weight on factors

47. The Appellant argues that while it is not disputed that the Appellant committed a serious crime, it is averred that this fact does not outweigh the other relevant factors in the current matter which meant that it was not reasonably justifiable to revoke the Appellant's RERC. In particular, it is averred that the following factors outweigh the seriousness of the crime:

47.1 The dangerous situation in Columbia.

47.2 The inability of the family unit to remain together.

47.3 The rehabilitation of the Appellant.

47.4 The lack of prospects of the Appellant reoffending.

48. Counsel for the Appellant highlighted that, during his criminal trial, the Appellant took the unusual step of giving evidence against a co-defendant, a man who had previously been found not guilty of a similar offence and who was a government worker. He says that this fact alone has not been considered by the Respondent and it is claimed that when one combines this with the above factors, the fact that the Appellant was convicted of a serious offence is outweighed by the other factors and that the decision is unreasonable in the circumstances.

Lack of Polices

49. The final argument put forward on behalf of the Appellant is that policies are a fundamental requirement in many parts of the immigration law of the Cayman Islands. Counsel says that this requirement is so that the decisions are consistent, rational, objective and not arbitrary and therefore comply with Section 19 of the BOR as set out in the Cayman Islands Constitution Order 2009 which requires decisions to be "*lawful, rational, proportionate and procedurally fair*".

50. The Respondent has a wide discretion as to what orders they can make as they deem fit[22]. It is the Appellant's contention that without guidance or policies, what should be objective assessments become subjective.

[22] Section 23 (1) of the 2022 Act.

51. It is argued that this is especially true in light of criticism that the immigration authorities have faced in the past. In particular in the case of *Ellington*, the Court of Appeal[23] stated:

> *"71. I start with a general observation. It is surprising that there was no evidence before the judge or before us as to what the practice is in the Cayman Islands as far as someone in Mr Ellington's position is concerned. Not only does the court not have any idea what the practice is, but also there are no directives or rules such as would one would expect (and is the case in England and Wales). All there is, is the legislation. That hardly seems a satisfactory situation on any view, as the judge pointed out."*

52. Equally, the Chief Justice in *Hutchinson Green & Racz*[24] expressed his deep reservations with regard to subjective assessments made by administrative bodies. In particular he stated:

> *"97. These explanations appear to describe a system that is intended to replace that which relied upon the Employment Relations Department's database and report used under the 2004–2010 points system. If so, there are immediate and obvious concerns, not least of which is the absence of any explanation as to what source of information or what considerations would inform the reviews and adjustments to be periodically carried out as contemplated by the second explanation. Nor is there any explanation as to who would be responsible for those exercises and what measures would be put in place to ensure that they are reasonably and objectively carried out.*
>
> *98. In light of the concerns identified and discussed in this judgment, it is difficult to imagine a policy that could be more opaque, uncertain and prone to arbitrariness than one by which points are to be allocated to occupations based upon merely subjective assessments of their importance in the context of the local economy.*
>
> *99. It is to be expected, therefore, that the periodical review and adjustments of which the second explanation speaks will be carried out in a manner capable of withstanding the kind of heightened scrutiny now required by the court."*

53. It is the Appellant's contention that the need for policies is especially true when a discretion such that as in this case is being exercised. This is to ensure that objective criteria are considered, there is consistency and that decisions of the Board and the Respondent are not opaque. In the case *R v Secretary of State for the Home Department, Ex parte Venables*[25], the then Master of the Rolls Lord Wolf held:

---

[23] Unreported CICA Civil Appeal No. 15 of 2020, 8 October 2020.
[24] [2015] 2 CILR 75
[25] [1997] 2 WLR 67

"The Home Secretary's discretion as to release is very wide. It is the type of discretion which calls out for the development of policy as to the way it will in general be exercised. This should assist in providing consistency and certainty which are highly desirable in an area involving the administration of justice where fairness is particularly important."

54. Counsel for the Appellant noted that a summary of the law can be found in the case of *Justice for Health Ltd, R (On the Application Of) v The Secretary of State for Health*[26] in which it was held:

> *"141. I turn now to the law. The principle of transparency has evolved out of Strasbourg jurisprudence but it is now well established as a common law principle. It is said to amount to a component of the "rule of law" and the principle of "legal certainty". In Nadarajah v Secretary of State for the Home Department [2005] EWCA Civ 363 at [68] Lord Justice Laws stated that it was a "requirement of good administration" (to which the courts would give effect) that "public bodies ought to deal straightforwardly and consistently with the public". The principle serves a number of important purposes. A law or policy should be sufficiently clear to enable those affected by it to regulate their conduct i.e. to avoid being misled. Such a law or policy should also be sufficiently clear so as to obviate the risk that a public authority can act in an arbitrary way which interferes with fundamental rights of an individual. Clear notice of a policy or decision is also required so that the individual knows the criteria that are being applied and is able to both make meaningful representations to the decision maker before the decision is taken and subsequently to challenge an adverse decision (for instance by showing that the reasons include irrelevant matters). Where the principle applies it might require the publication of the policy that a decision maker is exercising; it might require that the policy be spelled out in greater detail so that the limits of a discretion may be demarcated; it might require the decision-maker to be more specific as to when he/she will or will not act."*

55. It is the Appellant's contention (which was accepted by counsel for the Respondent) that, currently, there is no policy from the Board or the Respondent setting out how they assess section 9 of the BOR, what factors they may place more weight on, what evidence they require and the nature of that evidence. The Appellant says that it is very much an unclear process. In the House of Lord's case of *Alconbury*[27], at paragraph 143 it was held:

> *"... The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of an administrative discretion. Indeed policies are an essential element in securing the coherent and consistent performance of administrative functions. There are advantages both to the public and the administrators in having such policies. Of course there are limits to be observed in the*

[26] [2016] EWHC 2338 (Admin)
[27] [2001] UKHL 23

way policies are applied. Blanket decisions which leave no room for particular circumstances may be unreasonable. What is crucial is that the policy must not fetter the exercise of the discretion...."

56. The case of *Alconbury* follows an earlier judgment from the House of Lords. In the case of *Re: Findlay*, Lord Scarman held[28]:

> *"The contention stands or falls upon the view to be taken of the legislative purpose embodied in the relevant statutory provisions. The statute gives little, and at best only indirect, guidance as to the factors which the Secretary of State has to consider in the exercise of his power to grant parole or as to the weight to be given them. But they are many, and they are by no means confined to the particular circumstances or record of the prisoner. If the public interest is to be served, they must include some matters of policy, e.g. the weight to be given to the factors of deterrence, retribution, public confidence in the system, and to consistency of treatment as between one prisoner and another.*
>
> *For myself, I have difficulty in understanding how a Secretary of State could properly manage the complexities of his statutory duty without a policy."*

57. Furthermore, it is argued, the Respondent is not constrained by the fact that the Department of WORC has no policy, as was confirmed in the case of *R v Torquay Licensing Justice ex parte Brockman*[29], it was held that:

> *"The present case is not without importance because, in effect, it challenges the right of licensing justices to lay down for themselves a policy, or at, least to announce that they have such a policy, but it would seem clear that if the justices have decided upon a policy to guide them in considering applications it is only fair that they should make it public so that applicants may know what to expect."*

58. The Appellant claims that that, in the circumstances, the Respondent could create its own policies and the fact that there are no policies for the Board or the Respondent means that the decisions cannot be regarded as being reasonable or pursuant to the rules of natural justice and therefore it is contended that the decision of the Respondent is unreasonable.

---

[28] [1985] 1 AC 318, at page 335 of the judgment
[29] [1951] 2 KB 784

Summary of the position of the Respondent

Error of law

59. The Respondent argues that the position of the Appellant that the reference to the original application in section 22 (4) of the 2021 Act limits the Respondent's jurisdiction in a case such as this is based on an overly narrow construction of the powers of the Respondent on appeal, and one which cannot sensibly reflect the intention of the legislature.

60. The Respondent's positon is that that statutes must be construed as a whole and refers to Lord Walker of Gestingthorpe in *Customs and Excise Commissioners v Zielinski Baker & Partners Ltd*[30] who states:

> *"I return to the difference of opinion between Aldous LJ and Rix LJ. If the outcome of this appeal were to depend on a simple choice between a "step by step" approach and a "holistic" approach to statutory construction, it would be easily resolved in favour of the latter. A step by step approach sounds pedestrian and mechanistic ("ticking boxes" is, no doubt rightly, a fashionable term of disparagement) whereas a holistic approach would seem to accord with the universally acknowledged need to construe a statute as a whole."*

61. The Respondent says that the reference in section 22(4) of the 2021 Act to '*the original application which was the subject of the appeal'* has to be read in light of:

a. section 21(1) of the 2021 Act, which provides that any person aggrieved by, or dissatisfied with, *any decision* of a Board (other than a decision under section 20) may serve notice on the Respondent of the person's intention to appeal such decision; and,
b. section 22(10) of the 2021 Act, which prohibits the Respondent from remitting appeals or other matters referred to it back to the pertinent Board.

62. The Respondent contends that it is clear from sections 21 and 22 of the 2021 Act, when read together, that what the legislature envisaged was an appellate structure whereby the Respondent had jurisdiction to hear *any* appeal against a decision of the Board and, if grounds of appeal were established, that the Respondent would go onto hear the matter for itself. Counsel says that there can be no sensible explanation behind section 22(10) of the 2021 Act other than that an appellant should

[30] [2004] UKHL 7, at para. 38

not be made to go round in circles having the matter of their immigration status re-considered by the original decision maker.

63. The Respondent says that:

63.1 if the Appellant is correct, one would expect to see explicit provision made as to how the IAT is to treat the Board's decision in those circumstances or at least some provision which is clear as to the status of the Board's decision (e.g. whether it is void). That is especially so in light of the very specific instruction in section 21(9)(b) of the 2021 Act, which provides that the IAT should quash an appeal which is vitiated by some procedural irregularity (e.g. because the Appellant has failed to file the appeal in time).

63.2 The Appellant's argument creates an artificial distinction between decisions where the Appellant is seeking to have some right afforded to him and decisions where an existing right may have been forfeited. Not only is there no foundation for such a distinction in section 21(1) of the 2021 Act, which establishes the Respondent's jurisdiction to hear appeals from decisions of the Board, there is no discernible policy reason why, once grounds of appeal have been made out, the Respondent should have jurisdiction to rehear applications for the grant of particular types of immigration status, but not the jurisdiction to consider whether existing rights have been forfeited. The Respondent says that is difficult to see how a drawn-out process which, on the Appellant's case, would see the Board re-seized of the matter of its own motion, could further the interests of disposing of immigration appeals judiciously, expeditiously and economically.

64. Counsel also referred to the legislative history behind what is now sections 21 and 22 of the 2021 Act which she says does not support the Appellant's narrow reading of section 22(4). Counsel submitted that up until 25 October 2013, when assent was given to the Immigration (Amendment) (No. 2) Act, 2013, it was beyond doubt that appeals to the IAT against any decision of a Board, including appeals in relation to decisions to revoke permission to reside permanently in the Islands[31] were by way of rehearing. Section 15(1) of the Immigration Act (2013 Revision), which related to the jurisdiction of the IAT, provided as follows:

[31] At that time the provisions relating to revocation of spousal RERC were contained in section 33 of the Immigration Act (2013 Revision).

"15. (1) Save as otherwise provided in this Law, any person aggrieved by, or dissatisfied with, any decision of the Chief Immigration Officer under section 37C or 42(5) or of a Board other than a decision under section 14 may, within-

(a) twenty-eight days of the communication of the decision to him; or
(b) such longer period as the Chairman of the Immigration Appeals Tribunal may, for good reason shown, allow,

appeal there from by way of rehearing to the Immigration Appeals Tribunal, and matters referred to the Tribunal may not be remitted to that Board or to the Chief Immigration Officer."

Moreover, counsel argues, section 16(7) of the Immigration Act (2013 Revision) provided as follows:

"(7) Appeals to the Immigration Appeals Tribunal shall be by way of rehearing."

65. Counsel also referred to the fact that sections 15 and 16 of the Immigration Act (2013 Revision) were repealed and substituted by sections 5 and 6 of the Immigration (Amendment) (No. 2) Act, 2013 which introduced the two-staged approach to the determination of an appeal i.e. a hearing on the grounds (see section 15(8)(a)) followed by a rehearing if one or more of the grounds is made out (see section 16(4)). It was new section 16(4) which, for the first time, referred to *a rehearing of the original application which was the subject of the appeal.* Counsel says that the Memorandum of Objects and Reasons to the Immigration (Amendment) (No.2) Bill, 2013 does not explain the reference to the expression 'the original application' but there is no indication in the Memorandum of Objects and Reasons of an intention to limit the jurisdiction of the IAT with respect to particular types of appeal. Had that been the intention, counsel says that one would have thought that such a significant curtailment of the powers of the IAT would have been made explicit.

66. The Respondent argues that if the Appellant is unsuccessful with this argument and the Respondent is empowered to proceed to a rehearing of the Board's decision as to whether to revoke an RERC holder's right to reside permanently in the Islands, then the next question posed by the Appellant is whether the Respondent erred in law in failing to consider section 38(9) of the 2021 Act which is relevant to his "*original applicatio*n".

67. The Respondent says that in effect section 38(9) operates as a presumption in favour of the grant of an RERC to a person who has already been lawfully employed in the Islands and who marries a

Caymanian. That presumption will be displaced by exceptional circumstances. The Appellant's argument is that the same presumption should have been applied to his situation.

68. First, the Respondent argues, it is clear from the plain language of section 38(9) that this provision is engaged when a person applies for an RERC as the spouse of a Caymanian under this section. It does not apply to the separate question of whether a person who already holds a spousal RERC is to lose his/her right to reside permanently in the Islands as a result of having been convicted of an offence against the laws of the Islands. Counsel argues that that separate question was to be determined, in the Appellant's case, in accordance with section 40(1)(a) of the 2018 Act, read with section 51. Neither of those provisions cross-refers to section 38(9) or otherwise suggests that it is only in exceptional circumstances that the RERC holder will forfeit their rights under that certificate even where he/she falls within one of the provisions of section 51. The Respondent says that the Appellant has already had the benefit of the presumption in section 38(9) at the time of his application in 2013[32].

69. Secondly, counsel says that the scheme of section 40 of the 2018 Act, when read in its entirety, points against the application of the presumption laid down by section 38(9) in the case of forfeiture of a spousal RERC:

69.1 Under section 40(1) of the 2018 Act there are other grounds, beyond those which were relevant to the Appellant, on which a person will forfeit his or her rights under a spousal RERC. In many of those cases, there is simply no room for the exercise of discretion on the part of the Board or the Director of WORC in considering whether such grounds are made out. For example, section 40(1)(b) provides that an RERC holder shall forfeit his or her rights under an RERC where the holder's spouse ceases to be a Caymanian. Section 40(1)(c) provides that an RERC holder shall forfeit his or her rights under an RERC where, within ten years of the marriage, the marriage is dissolved or annulled. Whether or not an RERC holder's spouse has ceased to be Caymanian, and whether or not a marriage has been dissolved or annulled, is a question of fact. Once the Board has concluded that those facts are made out it has no discretion. That much is clear from the use of the words shall forfeit. The Respondent says that taking the Appellant's argument to its logical conclusion, however,

[32] See section 31(9) of the Immigration Act (2013 Revision).

the Board would also need to consider whether there were exceptional circumstances to justify the forfeiture.

69.2 The legislature has expressly set out in sections 40(2) and (3) of the Act the circumstances in which an RERC holder is able to apply to retain his/her RERC notwithstanding that he/she has, in principle, forfeited his or her rights under that certificate, that is to say:

69.1.1 where the person is the parent of a Caymanian child who is below the age of 18 or who is enrolled in tertiary education and below the age of 24 (see section 40(2) of the 2018 Act); and

69.1.2. where the person is the surviving spouse of a Caymanian (see section 40(3) of the 2018 Act).

The Respondent argues that it would undermine the effect of these provisions if the Director of WORC or the Board was to import into section 40 of the 2018 Act a separate presumption in favour of an RERC holder retaining their certificate, subject to exceptional circumstances.

70. Finally, the Respondent contends that in the case of a person who, like the Appellant, has been convicted of an offence against the laws of the Islands, the decision as to whether to revoke that person's right to reside permanently in the Islands (as a consequence of which they will forfeit their RERC) is discretionary. That is the effect of section 51 of the 2018 Act, which provides that the Board may revoke that person's permission. Furthermore, that discretion must be exercised consistently with section 9 of the BOR[33]. However, nothing in section 9 of the BOR requires the application of a presumption that a foreign national who has been sentenced to four years' imprisonment can only have their residence permit revoked in circumstances which can be said to be exceptional.

Failure to consider all the relevant factors

71. The Respondent argues that its failure to cite *Üner* in the Decision Letter does not mean that it applied the wrong test. Nor, the Respondent argues, can it be decisive as to whether the Respondent erred in its proportionality assessment pursuant to section 9 of the BOR.

[33] Section 24 of the BOR.

72. First, the Respondent says, as a specialist tribunal and an expert in this field, the Court should be slow to find that the Respondent applied the incorrect legal principles to its decision-making. As Baroness Hale of Richmond put it in *Secretary of State for the Home Department v AH (Sudan) and others*[34]:

> *"... This is an expert Tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert Tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the Tribunal will have got it right: see Cooke v Secretary of State for Social Security [2002] 3 All ER 279, para. 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate Courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently. ..."*

73. Secondly, the Respondent says that it is important to remember that *Üner* did not lay down a new test to be applied to all cases concerning settled migrants who are to be expelled and/or excluded following a criminal conviction. Nor did it overturn any previous test. On the contrary, counsel says that as the ECHR itself indicated at paragraph 58 of its judgment, it merely wished to make explicit two criteria which it considered were implicit from its judgment in *Boultif* and other earlier rulings. In the premises it is argued that the failure to cite *Üner* cannot be fatal to the Respondent and that, applied properly, the factors set out in *Amrollahi* will inherently include considerations relating to the best interests and well-being of the migrant's children and the solidarity of social, cultural and family ties with the host country and the country of destination.

74. Finally, the Respondent argues that it is clear that it did give due consideration to those factors which were made explicit in *Üner* and, in particular, the best interests and well-being of M and the difficulties he would encounter in Colombia if he were to accompany his father:

74.1 The very fact that the Respondent had adjourned the appeal hearing to allow for further evidence from the Appellant's wife with respect to *inter alia* the Appellant's relationship with M; information as to whether Ms. Taveras and M continued to visit the Appellant in prison; and information as to the difficulties the Appellant's Ms. Taveras and M would likely encounter if the Appellant was returned to his country of origin means, the Respondent

[34] [2007] UKHL 49 at para. 30

argues, that that it cannot sensibly be argued that it did not have these additional factors in mind at the time it made its decision; and,

74.2 In its Decision Letter the Respondent:

74.1.1 acknowledged all the children of the family (including the Appellant's step-children) and their respective ages;

74.1.2. expressly referred to the contents of the affidavit of Ms. Taveras of 18 January 2021 and the particular paragraphs of that affidavit which set out the difficulties the family unit would face if the family were forced to leave the Cayman Islands for Colombia and the observation made by Ms. Taveras that the simple fact was that her family unit could not go to Colombia;

74.1.3 expressly stated that it had taken account of the adverse effects that failing to reinstate the Appellant's RERC would have on his Caymanian family; and

74.1.4 noted that the Appellant could arrange to visit his family in a safe country if Colombia was too unsafe to visit.

Failure to place sufficient weight on factors

75. Counsel for the Respondent accepts that the Respondent's decisions are administrative, rather than judicial, in nature but that this does not abrogate the Respondent from the common law principles of natural justice or the requirements of section 19 of the BOR[35]. However, the Respondent disputes that either section 19 of the BOR, or the duty at common law to provide reasons, demand the level of specificity the Appellant claims. The Respondent argues that the fact that the Decision Letter may not set out its conclusions on each and every one of the matters that the Appellant suggests is relevant does not render the Respondent's decision unreasonable. The Respondent says that it is supported in that proposition by the guidance of the House of Lords in *South Bucks. D.C. v. Porter (No. 2)*[36]:

> *"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues',*

[35] See, to that effect, Hon. Justice Mangatal in *HS and Six Others v Immigration Appeals Tribunal* [2019 (1) CILR 545] at para. 34.

[36] [2004] 1 W.L.R. 1953, at para. 35. See also Hon. Justice Henderson in in *National Roads Authority v Bodden* [2014] (2) CILR 47, at paras. 25-27.

disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration ... A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.

76. The Respondent is of the view that it is clear from its Decision Letter that it did consider the matters raised by the Appellant.

77. The Respondent goes further and argues that it is manifestly clear that the best interests of M were a primary consideration in its decision-making. The Respondent accepts that the UN Convention on the Rights of the Child extends and applies to the Cayman Islands. However, the Respondent argues that the duty on an administrative authority to take account of the best interests of the child as a primary consideration adds nothing to the duty which already applied to the Respondent in this case by virtue of section 9 of the BOR. In *Jeunesse v the Netherlands*[37] the Grand Chamber of the EHCR said:

> *"Where children are involved, their best interests must be taken into account (see Tuquabo-Tekle and Others v. the Netherlands, no. 60665/00, § 44, 1 December 2005; mutatis mutandis, Popov v. France, nos. 39472/07 and 39474/07, §§ 139-140, 19 January 2012; Neulinger and Shuruk v. Switzerland, cited above, § 135; and X v. Latvia [GC], no. 27853/09, § 96, ECHR 2013). On this particular point, the Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance (see Neulinger and Shuruk v. Switzerland, cited above, § 135, and X v. Latvia, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it."*

78. In relation to the alleged failure to consider the fact that the offence took place after the Appellant had established a private and family life in the Cayman Islands, the Respondent contends that:

---

[37] Application no. 12738/10, 3 October 2014 at para. 109.

78.1 Paragraph 6 of the Decision Letter records as follows, "*The offence occurred during the marriage to the Appellant's Caymanian spouse*";

78.2 The Appellant appears to have misconstrued the relevance of this factor and its application to his particular circumstances. The fact that the Appellant only engaged in criminality after his marriage is not, as the Appellant seems to suggest, a point which would go to his credit in the section 9 balancing exercise. This factor would, the Respondent argues, only be of any real relevance in this case had the Appellant embarked upon family life at a time when his immigration status was precarious as a result of his offending. In those circumstances the claim to respect for family life would be inherently weak. As the ECHR stated in *Rodrigues Da Silva, Hoogkamer v Netherlands*[38]:

> *"Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see Gül v. Switzerland, 19 February 1996, § 38, Reports 1996-I). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles to the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see Solomon v. the Netherlands (dec.), no. 44328/98, 5 September 2000). Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998, and Ajayi and Others v. the United Kingdom (dec.), no. 27663/95, 22 June 1999)."*

At best, the Respondent says, the fact that the Appellant's offending behaviour occurred at a point in time when family life was already established is a neutral factor in the proportionately assessment to be undertaken pursuant to section 9 of the BOR. It is not, counsel argues, a factor which can go in his favour in the same way that his conduct since the offending might.

---

[38] (2006) 44 EHRR 34

79. As to the argument that the Respondent failed to consider or place sufficient weight on the fact that the Appellant had given evidence against his co-defendant, the Respondent notes that this is not a factor explicitly enumerated in the *Boultif* criteria. To the extent that the Appellant's cooperation with authorities is relevant to the nature and severity of the offence(s) committed, or the Appellant's conduct since the offending behaviour, the Respondent notes this was already reflected in the sentence handed down to the Appellant by the criminal courts. The Appellant was given close to a two-thirds discount for his assistance and the fact that the Appellant cooperated with the authorities and received a consequent reduction in his sentence does not detract from the severity of the offences. In any event, the Respondent says that it gave due consideration to the Appellant's contrition for his offences in its Decision Letter, where it referred to extracts from the Appellant's letter to the Board of 26 August 2019 expressing his remorse.

80. The Respondent submits that there is no substance to the argument that the Respondent failed to consider the Appellant's lack of re-offending and lack of prospects of re-offending in the Cayman Islands. In fact, it referred expressly in its Decision Letter to:

80.1 the fact that the Appellant had not been convicted of any crimes for the nine years he had been living in the Cayman Islands prior to his incarceration;

80.2 the report from HMCPS that the Appellant had been a model prisoner;

80.3 the letter of 14 January 2021 from the Department of Community Rehabilitation confirming that the Appellant had been compliant during his period in custody and that, since his release on licence, he had been compliant with his conditions and there had been no further encounters with the police.

The Respondent says that it is implicit from the decision that these facts were accepted by the Respondent.

81. Finally, the Respondent's position is that it was entitled to regard the Appellant's offences as very serious and weighing heavily in the balancing exercise. Where a foreign national commits a serious crime, it is legitimate for the Respondent to factor into its consideration the public policy need to express society's revulsion at the seriousness of the criminality[39] and an element of deterrence so that

[39] See, to that effect, N *(Kenya) v The Secretary of State for the Home Department* [2004] EWCA Civ 1094 at para. 64

other foreign nationals understand that one of the consequences of serious crime may well be deportation:

> *"The public interest in deportation of those who commit serious crimes goes well beyond depriving the offender in question from the chance to re-offend in this country: it extends to deterring and preventing serious crime generally and to upholding public abhorrence of such offending."*[40]

82. In the Respondent's submission, provided that the Respondent:

82.1 set out the legal tests correctly (as it did by enumerating the factors in *Boultif)*;

82.2 evaluated the evidence put forward by the Appellant (as is clear from the Decision Letter);

82.3 conducted the balancing exercise called for by section 9 of the BOR, which involves weighing the relevant factors in the round;

82.4 came to sustainable conclusions; and

82.5 provided the Appellant with sufficient reasons for the Appellant to able to discern why the matter was decided as it was,

the Respondent's decision cannot be regarded as unreasonable.

Lack of Polices

83. The Respondent made it clear that it does not accept this argument by the Appellant either. In response, the Respondent argues that:

83.1 The 2021 Act itself sets out the grounds on which the spouse of a Caymanian who has been granted an RERC may forfeit their right to reside permanently in the Islands. The Respondent's position is that the 2021 Act provides a sufficiently clear framework for the Appellant to understand the parameters of the exercise of the decision-maker's discretion (where such a discretion exists).

83.2 The discretion afforded to the Board and, by extension, the Respondent in circumstances where the RERC holder has been convicted of an offence against the laws of the Islands must be exercised in a way that is compatible with the right to private and family life protected by section 9 of the BOR[41]. That is necessarily a fact sensitive exercise involving close examination of the particular circumstances of the individual and that of their family,

[40] See Rix LJ in *DS (India) v Secretary of State for the Home Department* [2009] EWCA Civ 544, at paragraph 37.
[41] See section 24 of the BOR

all of which must be considered in the round. As the ECHR was keen to stress in *Unuane v The United Kingdom*[42]:

> *"...the criteria which emerge from its case law and are spelled out in the Boultif and Üner judgments are primarily meant to facilitate the application of Article 8 in expulsion cases by domestic courts. Furthermore, the Court reiterates that nevertheless, in applying these criteria, the respective weight to be attached to them will inevitably vary according to the specific circumstances of each case (see Maslov, cited above, § 70 and A.A. v. the United Kingdom, no. 8000/08, § 57, 20 September 2011)."*

The Respondent claims that the case law of the ECHR offers the appropriate guidance as to the factors to be taken into account by a decision maker in conducting the balancing exercise envisaged by Article 8 of the Convention, which affords equivalent protection to that under section 9 of the BOR. There is, in the Respondent's submission, no need for written policy guidance rehearsing those factors and where, as in this case, the decision maker has had due regard, and given proper weight, to them, it is simply unarguable that the absence of a policy renders the decision automatically unreasonable/irrational.

83.3 The Respondent argues that it would not, in any event, be for the Respondent, as an appellate body, to produce policy guidance. The Respondent argues that relevant direction making powers are conferred on Cabinet pursuant to sections 5 and 73 of the 2021 Act and the failure of the Respondent to do so cannot properly be said to be unreasonable:

> "5. *The Cabinet may give to Director of WORC such directions, not inconsistent with the provisions of this Act, as the Cabinet thinks fit as to the performance of the functions of WORC and the exercise of its powers, as the Director of WORC shall give effect to any such directions.*
>
> ...
>
> *73. The Cabinet may issue policy directions to the Boards and the Immigration Appeals Tribunal for their guidance in the exercise of their respective powers, duties and functions under this Act, and it shall be the duty of the Boards and the Immigration Appeals Tribunal to put into effect and to carry out such directions."*

Discussion and conclusion

84. I am conscious that the Appellant is currently unable to work and that this matter has dragged on for some time. It is clearly in his best interests and those of his family that matters are concluded as

[42] Application No. 80343/17, 24 November 2020, at paragraph 78.

quickly and efficiently as they can but without putting at risk a proper consideration of the respective rights and interests of the state and the individual.

85. The first issue raised by the Appellant is the question of the approach that the Respondent should have taken to the appeal bearing in mind that as the Appellant suggests there was no original application for it to consider under section 22 (4) of the 2021 Act other than the Appellant's original application for his RERC in 2013. There is clearly, in my view, an anomaly in the 2021 Act (and therefore the 2022 Act) with the inclusion of the words "*original application*" instead of "*decision*" which is what seems to have appeared in the comparable sections of previous versions of the law.

86. Although the Respondent's counsel referred to the case of *Zielinski Baker & Partners*, a more helpful decision is that of Mangatal J in *BDO Cayman Limited & Four Others v Governor in Cabinet*[43] in which a question arose as to the correct approach to interpreting the Trade and Business Licensing Law (2007 Revision). The judge stated:

> *"123 In my judgment, the correct approach to the issue at hand is that, as argued by the respondent, with the exception of reports of proceedings in Parliament, including Hansard, which are subject to special rules laid down in Pepper v. Hart (11) (as qualified in later cases), both "internal" and "external" aids to construction may be considered regardless of whether there is any "ambiguity" in the grammatical or literal meaning of an enactment.*
>
> *124 While the grammatical or literal meaning is the starting point, the court must construe the enactment in its wider context in order to determine the intention of the legislator, which is the "paramount criterion." Only then can the court identify the legal meaning of the enactment.*
>
> *125 It is only if the enactment is grammatically capable of one meaning only, and on an informed interpretation of that enactment the interpretative criteria raise no real doubt as to whether that grammatical meaning is the one intended by the legislator, will the legal meaning have the same meaning as the grammatical meaning (the "plain meaning" rule—see Bennion, s.195, at 507). If, on the other hand, on an informed interpretation the wider context does raise a doubt as to whether that meaning is the one intended by the legislator—when it may be said the provision is ambiguous or leads to an absurdity—then the court will need to weigh the competing considerations, including any relevant statutory presumptions, in determining the legal meaning. But it is not necessary for an "ambiguity" to be identified before that wider context is considered. See Bennion, s.193 at 504.*

[43] [2018] (1) CILR 457

> *126 On an "informed interpretation" the court considers the wider context including internal aids, such as other provisions in the same statute, and it may include external aids, such as the legislative history and other materials in pari materia which may provide guidance as to the underlying legislative intention. It is in my view not necessary (as the applicants contend) for there to be some "ambiguity" before those aids to construction may be considered. Thus, the court can consider these aids to construction even where the grammatical or legal meaning of a provision is clear.*
>
> *127 However, I appreciate that the clearer the meaning, the slower the court should be in adopting another meaning on the basis of an external aid. In R. (Spath Holme Ltd.) v. Environment Secy. (16), Lord Nicholls explained ([2001] 2 A.C. at 398):*
>
> > "Judges frequently turn to external aids for confirmation of views reached without their assistance. That is unobjectionable. But the constitutional implications point to a need for courts to be slow to permit external aids to displace meanings which are otherwise clear and unambiguous and not productive of absurdity. Sometimes external aids may properly operate in this way. In other cases, the requirement of legal certainty might be undermined to an unacceptable extent if the court were to adopt, as the intention to be imputed to Parliament in using the words in question, the meaning suggested by an external aid. Thus, when interpreting statutory language courts have to strike a balance between conflicting considerations." [Emphasis supplied.]
>
> *128 The "purposive" approach to statutory interpretation has now displaced the literal approach. Further, the literal approach that was previously adopted in relation to tax statutes has since the decision of the House of Lords in WT Ramsay Ltd. v. Inland Rev. Commrs. (22) been expressly disavowed so that such statutes are construed in the same way as any other statute, i.e. purposively. See also Barclays Mercantile Business Fin. Ltd. v. Mawson (Inspector of Taxes) (2) ([2005] 1 A.C. 684, at paras. 28–29), and UBS AG v. Revenue & Customs Commrs. (21) ([2016] UKSC 13, at paras. 61–62).*

87. It seems to me that there can be little doubt that the use of the words "*original application*" in the wording of section 22 (4) of the 2021 Act not only makes no sense when read literally in the context of the current appeal but the words are also ambiguous when considered in the context of the other provisions relating to appeals and the appeal process where there is clear reference to a "*decision*". Therefore, this is a case which, in my view, requires a purposive approach rather than a literal one, looking at the legislation as a whole and its legislative history. The court should look to internal and external aids to interpret the relevant section. I also note that the words "*original application*" appear in section 22(1)(a) which will require similar analysis.

88. The relevant sections of the 2021 Act clearly provide for appeals from decisions of the Board and, in turn, from decisions of the IAT. In my view the words "*original application*" make no sense when the appeal in question is one against a decision of the Board to revoke an existing RERC and is not an appeal against the rejection of an application for one, in which context they do make sense. Indeed during the course of argument, Ms Walker suggested that this is a legislative drafting error and that the draftsperson may have had in mind appeals from decisions rejecting original applications for RERCs which she suggested were far more common than appeals against the revocation of existing rights.

89. This is consistent with the legislative history as set out by Ms Walker. It does not make sense that the Respondent should quash appeals in relation the decisions of the Board in revocation cases such as this where there has been no original application that prompts the Board's decision, leaving the Board to deal with the issue afresh. I agree with Ms Walker that if that was the intention of the legislature then there should have been some more specific statutory provision to that effect. During the course of the hearing, Ms Walker referred to the Memorandum of Objects and Reasons in the preamble to the Immigration (Amendment) (No.2) Bill, 2013 and pointed out that it in relation to clauses 4 to 7 of the Bill, which were amending or replacing the relevant sections of the then existing law, the intention was to overhaul and reform the appeal process with a view primarily to expediting the disposal of appeals to be heard by the IAT.

90. Counsel for the Appellant has argued this particular point in the alternative, but that alternative involves what I can only describe as contortions of logic that lead to a result that is, in my view, an absurdity.

91. It seems to me that the way to give effect to that intention and to make sense of sections 22(1) and (4) of the 2021 Act is to read the words "*original application*" as meaning "*original application or decision*" depending on the context. Either way, in my view, to do otherwise leaves that aspect of the legislation unclear and open to absurd results.

92. In my view, therefore, it was not open to the IAT to quash the decision of the Board on the basis that the Board had made an error of law because there was no original application that prompted its decision.

93. Having found that, I turn to consider the question of whether the Respondent failed to consider all the relevant factors when dealing with the Appellant's appeal. There is no doubt from the number

and complexity of the authorities in this area that the issues at hand are complex. Having said that, as was mentioned in *Ali,* it is clear that the principles or criteria considered in *Üner* are fundamental to an examination of whether article 8 or section 9 rights are to be applied in all cases. It is also clear from *Ali* and a number of the other cases such as *EB (Kosovo)* and *Huang* that different emphasis should be placed on some of those criteria, depending on the particular facts.

94. As mentioned earlier, as was stated in *EB (Kosovo)*:

> *"Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires."*

95. As a general point, I am of the view that bearing in mind the importance of the decisions of the Board and the IAT in this area and the need to carry out careful and informed evaluations of the facts of the particular case it is incumbent on both bodies to ensure that the basis for their decision making is sound. I will come to the question of polices later. The basis of decision making in this area is driven by the relevant law. Whilst it may be appropriate for the IAT to make reference to *Amrollahi* and the eight criteria that it sets out, it is not appropriate, in my view, to do so in isolation from subsequent authority such as *Üner* which did add to those criteria by making explicit the following two criteria:

> *"the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and*
>
> *- the solidity of social, cultural and family ties with the host country and with the country of destination."*

96. The reference to *Amrollahi* in such circumstances is incomplete and out of date and it seems to me leaves the IAT in some difficulty demonstrating that it has approached the consideration of the Appellant's section 9 rights in a careful and informed way.

97. Although the IAT says in its Decision Letter that it has taken into account the *Amrollahi* criteria, in my view this is clearly a case where the additional criteria set out in *Üner* are relevant and directly applicable. For the reasons set out in *Üner* they cannot, in my view, be implied into the *Amrollahi criteria.* They are some of the "*principal important controversial issues*"[44] in this case and they should have been set out in the Decision Letter and they should have been considered in detail. In my view, were not. An approach similar to that set out in *Ali* should have been followed; namely, a balance sheet type exercise setting out each of the pros and cons followed by reasoned conclusions as to whether the countervailing factors outweighed the importance attached to the public interest in the removal of the Appellant. It seems to me, that because the *Üner* criteria were not specifically identified, it is not possible to determine whether sufficient weight was given to them and how those issues factored into the decision making process of the Respondent to the extent required by the authorities reviewed in *National Roads Authority*. I do not agree with Ms Walker that the application of the additional *Üner* criteria can be said to be implicit in the Decision Letter and to have to imply that they were considered seems to me to undermine the Decision Letter to the point at which it must be in doubt as to whether it is rational, proportionate and procedurally fair as required by section 19 of the BOR. On that basis, in my view, the Respondent erred in law.

98. As can be seen from the relevant wording of the Decision Letter, after referring to the affidavit from Ms Tavares, the Respondent states:

> *"After the Tribunal reviewed the matters mentioned above, the nature and seriousness of the offence weighs heavily in comparison to the other factors. The Tribunal noted the seriousness of the effects of cocaine use on addicts and the poverty and crime that results. The high number of known cocaine addicts seen begging on our streets along with the breakdown of family life was also considered. Additionally, the Tribunal took account of the adverse effects failing to reinstate the Appellant's RERC would have on his Caymanian family, however, the seriousness of the offence overrode the Appellant's right to live here with his family in the Tribunal's opinion.*
>
> *As a non-Caymanian the Appellant abused the privileges afforded to him as the spouse of a Caymanian and is not now entitled to have those rights re-instated as a result of the hardships to be suffered by his family. It was also noted that the Appellant could arrange to visit his family in a safe country as his home country is deemed too unsafe to visit.*

[44] *National Roads Authority v Bodden*

99. In my view the Respondent failed to engage in any meaningful analysis of what Ms Tavares had said about the difficulties she and the children would have in having to move to Colombia with the Appellant or of the ties that the Appellant had with them in the Cayman Islands. On that basis, I find that the Respondent also acted unreasonably.

100. As for the Appellant's argument that the Respondent placed too much weight on the seriousness of the Appellant's crime (and I would not suggest for one moment that it was not serious) I would only observe what was said in *Ali* which I have quoted above and will quote again:

> *"... it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child."*

101. At the end of the day it is for the IAT to carry out a demonstrably proportionate and reasoned analysis of all the relevant criteria, which, in my view, it has not done in this case.

102. Ms Walker suggested that the court should approach the Respondent as a specialist tribunal and expert in this field and should be slow to interfere with its decision making. The composition of the Board and the Respondent are provided for by the 2021 Act. In the case of the Board its composition is as follows:

> *"The Caymanian Status and Permanent Residency Board shall consist of the following persons appointed by and holding office at the pleasure of the Cabinet save for those persons referred to in paragraphs (e) to (g) who shall be public officers and shall hold office by virtue of their public service appointment —*
>
> *(a) a chairperson;*
> *(b) a deputy chairperson;*
> *(c) twelve members selected from among persons legally and ordinarily resident in the Islands;*
> *(d) the Director of WORC or the Director's designate;*
> *(e) the Head of Work Permits, Cayman Status and Permanent Residence or the Director's designate*
> *(f) a Secretary; and*
> *(g) an assistant Secretary."*[45]

103. The IAT is composed as follows:

> *"(1) For the purposes of this Act there continues to be established an Immigration Appeals Tribunal which shall consist of the following members —*

[45] Section 10(3) of the 2021 Act

(a) a chairperson;
(b) up to five deputy chairpersons; and
(c) a panel of persons, all of whom shall be appointed by and hold office at the pleasure of the Cabinet.

(2) The chairperson shall be an attorney-at-law of at least seven years call to the bar; and each deputy chairperson shall be an attorney-at-law of at least five years call to the bar.

(3) For the purposes of exercising its jurisdiction the Immigration Appeals Tribunal may, if the chairperson so directs, sit in up to six divisions simultaneously or otherwise, each division presided over either by the chairperson or by a deputy chairperson sitting together with no fewer than two other members; and each such division shall be deemed to be a fully constituted Immigration Appeals Tribunal to hear and determine appeals under this Act.

(4) The Cabinet shall appoint as many Secretaries as it considers necessary to the Immigration Appeals Tribunal who shall cause to be recorded and shall keep all minutes of the meetings, proceedings and decisions of that Tribunal, and such Secretaries shall have no right to vote."[46]

104. Other than in the case of the chairperson and deputy chairpersons of the IAT, there is no requirement for members to be legally trained or to have any expertise in immigration law or human rights law. It is also common knowledge that members of statutory boards and constitutional commissions are volunteers. Without suggesting for one moment that the members of such bodies are anything other than hardworking and dedicated to what they do, I am not of the view that those bodies can be regarded as specialist in the way that Ms Walker has suggested. As the Chief Justice said in *Hutchinson Green & Racz*, the activities of such bodies require heightened scrutiny by the court.

105. In relation to the question of policies for the Board and the IAT, it is surprising that despite cases such as *Ellington* and *Hutchinson Green & Racz*, such policies have not been put in place. Despite the various arguments put forward by counsel, my approach to this issue is to start with sections 14(7) and 18(6) of the 2021 Act. These provide that in the case respectively of the Board and the IAT, each has power to regulate its own procedure. Ms Walker referred to section 73 of the 2021 Act which seems to me to provide for Cabinet to provide policy guidance at a political level to the Board and IAT. Sections 14(7) and 18(6) clearly, in my view, give each of the bodies to set their own policies and procedure.

106. As was said in *Alconbury*[47]:

[46] Section 17 of the 2021 Act
[47] [2001] UKHL 23

> *"... The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of an administrative discretion. Indeed policies are an essential element in securing the coherent and consistent performance of administrative functions. There are advantages both to the public and the administrators in having such policies. Of course there are limits to be observed in the way policies are applied. Blanket decisions which leave no room for particular circumstances may be unreasonable. What is crucial is that the policy must not fetter the exercise of the discretion...."*

107. Similarly in Re: Findlay, Lord Scarman held[48]:

> *"The contention stands or falls upon the view to be taken of the legislative purpose embodied in the relevant statutory provisions. The statute gives little, and at best only indirect, guidance as to the factors which the Secretary of State has to consider in the exercise of his power to grant parole or as to the weight to be given them. But they are many, and they are by no means confined to the particular circumstances or record of the prisoner. If the public interest is to be served, they must include some matters of policy, e.g. the weight to be given to the factors of deterrence, retribution, public confidence in the system, and to consistency of treatment as between one prisoner and another.*
> *For myself, I have difficulty in understanding how a Secretary of D State could properly manage the complexities of his statutory duty without a policy."*

108. Ms Walker suggests that the 2021 Act itself sets the policy framework and structure for the decision making of the Board and IAT. I disagree. It is not the purpose of a statute such as the 2021 Act to provide that level of guidance to the operational decisions of bodies such as the Board and the IAT. In my view, such policies and procedures can only be set by those bodies themselves possibly with specialist legal input.

109. It is also suggested by Ms Walker that the case law of the ECHR provides necessary guidance to the Board and IAT. I think that such law clearly can provide some guidance but it does not appear that the IAT is operating on that basis because of the outdated reference to *Amrollahi.* Indeed, if the Board and IAT are to be guided by ECHR case law and English and Cayman Islands case law for that matter then it is all the more reason for those bodies to have a policy in place for ensuring that they are relying on the most up to date applicable case law and that, in turn, that case law is properly applied in each case. To do otherwise, clearly makes their decision vulnerable to legal challenge as being unreasonable and risks infringing the constitutional rights of the individual.

---

[48] At page 335 of the judgment

110. The absence of such policies and procedures does not, of itself, necessarily mean that decisions of the Board and IAT are unreasonable. However, their absence does, in my view, make decisions susceptible to criticism in that, without a clear framework establishing and setting out how these bodies approach their statutory role and particularly the exercise of statutory discretion, it is difficult to understand how decisions have been taken, on what basis, whether they are reasonable and proportionate and whether they are consistent.

111. Having said that, I do not find that the absence of policies and procedures itself means that the decision in this case is unreasonable. However, for the reasons given, the Respondent did in my view err in law by failing to apply the correct and complete legal principles to its assessment of the section 9 rights of the Appellant and, to the extent that it did apply incomplete and outdated legal principles to that assessment, it did not do so in a meaningful, balanced way and acted unreasonably. On that basis, this matter should be remitted back to the Respondent for determination taking into account the issues that have been raised before the court and covered in this judgment.

112. The Respondent is to pay the Appellant's costs on the standard basis, to be taxed if not agreed

Hon Mr Justice Alistair Walters
Acting Judge of the Grand Court